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Official Committee of Unsecured Creditors

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re: Case No.: BK-S-10-27855-BAM

AMERICAN PACIFIC FINANCIAL CORPORATION,
Chapter 11

Debtor.

**RESPONSE OF OFFICIAL
COMMITTEE OF UNSECURED
CREDITORS TO EX PARTE MOTION
TO FILE SUPPLEMENTAL
DECLARATION OF PAUL HAZELL
IN SUPPORT OF MOTION FOR
APPOINTMENT OF TRUSTEE
UNDER SEAL**

Hearing Date: N/A
Hearing Time: N/A

The Official Committee of Unsecured Creditors (the "Committee") agrees that if the documents identified by Mr. Hazell are to be filed, they must be filed under seal pursuant to Federal Rule of Bankruptcy Procedure 9018. However, the Committee opposes the filing of any documents by Mr. Hazell (Ct. Dkt. #255) on the grounds that (1) the documents are privileged, and (2) Mr. Hazell is not authorized to individually waive the privilege as a committee member, or individually exercise the provisions of the confidentiality agreement provided by the Committee. His unilateral attempt to utilize the work product of the committee's professionals should not be permitted, as it undercuts the efforts of the committee as a whole to evaluate and respond to the debtor's proposals. The Committee asserts privileges over each of these records sought to be filed by the Debtor and has not waived said privileges. To the extent necessary, the Committee cross moves for a temporary

1 restraining order to prohibit Mr. Hazell from disclosing these records. Fed. R. Bankr. P. 7065, inc.
2 by ref. Fed. R. Civ. P. 65(b).

3 Mr. Hazell is a member of the Committee (Ct. Dkt. #80). As such, he has received copies of
4 communications and reports from the committee's counsel and accountant. Mr. Hazell also is the
5 only member of the committee to independently appear in this case, having been represented at
6 different times by Kelly Brinkman, Philip Gerson, and Lenard Schwartz. See, respectively, Ct.
7 Dkt. #102, Ct. Dkt. #170 & 215, and **Exhibit 1**.

8 Mr. Hazell also submitted a declaration in support of the U.S. Trustee's motion to appoint a
9 trustee (Ct. Dkt. #s 231, 233). Mr. Hazell independently in providing the declaration. The
10 Committee did not have advance notice of the filing of his declaration. Mr. Hazell's current motion
11 to file additional documents also is done independently of his role as a committee member.
12 Undersigned counsel attests that Mr. Hazell did not seek Committee authorization to file the
13 Committee's records identified in his ex parte motion, and that the Committee has neither authorized
14 the filing of these records nor waived any privilege.

15 To be sure, as evidenced as the draft of the confidentiality agreement attached to the ex parte
16 motion, does not authorize individual members of the Committee to personally utilize information
17 acquired under the confidentiality agreement. Yet Mr. Hazell is attempting to do so with his
18 proposed filing of the accountant's report. Mr. Hazell's proposal is particularly troubling to the
19 Committee, as Debtor is now challenging the Committee's compliance with the Confidentiality
20 Agreement. The Committee does not agree with the Debtor's assertions, but Mr. Hazell's unilateral
21 attempt to utilize the report for his own agenda is creating additional unnecessary work for the
22 Committee to protect its work product. Mr. Hazell should not be allowed to hijack the work product
23 and use it for what he perceives as his own benefit.

24 Additionally, the Committee strongly disagrees with Mr. Hazell's assertions that the
25 Committee has conflicting interests. Mr. Hazell has repeatedly raised these issues with the
26 Committee and the Office of the U.S. Trustee, and individual committee members have identified
27 these issues to the Office of the U.S. Trustee. Yet to date, the U.S. Trustee has not sought to remove
28 any members from the committee, but instead has determined that the issues alleged by Mr. Hazell

do not prohibit the individual members to sit on the committee.

The Committee now addresses the four records that Mr. Hazell seeks to file:

1. An email exchange between Mr. Hazell and Larry Polhill, the Debtor's principal.

The Committee does not assert a privilege over this communication. It states it is dated September 25, 2010, and it occurred before the appointment of the committee on November 4, 2010 (Ct. Dkt. #79). It cannot be a communication made between the debtor and the committee; furthermore, it is not an attorney-client communication.

2. An email to the Committee members from Anne Loradich, Esq., with Fox Rothschild LLP, the Committee's original counsel.

Although the law firm of Fox Rothschild was never formally retained as a professional to represent the Committee, the Committee did consult with the law firm and originally sought to retain the firm. Thus, the committee constitutes a client entitled to assert the attorney-client privilege under NRS 49.045, 49.095, 49.105(1). The privilege requires that the communication be "Made for the purpose of facilitating the rendition of professional legal services to the client, by the client or the client's lawyer to a lawyer representing another in a matter of common interest." NRS 49.095(3). The Committee has reviewed the email proposed to be submitted and believes it falls within the attorney-client privilege as Ms. Loradich's summary of issues for the Committee's consideration in determining its course of action in the bankruptcy case. Alternatively, to the extent the email constitutes a factual summary, the Committee asserts the communication is protected by the work-product doctrine as Ms. Loradich's notes provided to the Committee. *E.g., Means v. State*, 120 Nev. 1001, ___, 103 P.3d 25, 30 (2004).

3. An email to the Committee members from Anne Loradich, Esq., with Fox Rothschild LLP.

The Committee also asserts that this email is protected by the attorney-client privilege, the work-product doctrine, or both. The Committee has reviewed the email proposed to be submitted, and Ms. Loradich provides the Committee with legal advice about the attorney-client privilege.

4. A report prepared for the Committee by its accountant, McGovern & Greene LLP.

The Court approved the employment of McGovern & Greene LLP as accountants for the

1 Committee (Ct. Dkt. #163). Craig Greene, a founding partner of the accounting firm and the
2 accountant assigned to the Committee, has been licensed as a certified public accountant by the State
3 of Nevada since 2008 (and by the State of Illinois since 1979) (Ct. Dkt. #150, Decl. of C. Greene).
4 Mr. Greene met with Mr. Polhill, reviewed records from Debtor and Mr. Polhill, and conducted his
5 own independent research regarding Debtor. Mr. Greene then prepared a report for the Committee's
6 consideration, with a discussion of his factual research and accounting evaluations about the Debtor.

7 Mr. Hazell, as a member of the Committee, received a copy of that report. He now seeks to
8 introduce that report in this case. The Committee asserts the accountant-client privilege and the
9 attorney-client privilege over this report, and the Committee has not waived either privilege. To the
10 extent necessary, Committee moves for a temporary restraining order to prevent Mr. Hazell from
11 filing the report with the Court or otherwise disclosing it without the Committee's consent.

12 The Committee recognizes that under Federal Rule of Evidence 501, there are limitations on
13 the application of a state-law accountant-client privilege. *E.g.*, *United States v. Arthur Young & Co.*,
14 465 U.S. 805, 817-18 (1984). However, in the bankruptcy context, court generally have declined to
15 apply the accountant-client privilege when the debtor is seeking to shield its financial records. *See In*
16 *re International Horizons, Inc.*, 689 F.2d 996 (11th Cir. 1982); *Peat, Marwick v. Creditor's Cte.*, 65
17 B.R. 886 (N.D.N.Y. 1986); *In re Oxford Royal Mushroom Products, Inc.*, 41 B.R. 863 (Bankr. E.D.
18 Pa. 1984); *In re GHR Cos.*, 41 B.R. 655 (Bankr. D. Mass. 1984); *In re Mori*, 1 B.R. 265 (Bankr. S.D.
19 Fla. 1979).

20 However, the Committee asserts that the facts at hand warrant the application of the state-law
21 privilege to prevent disclosure of the accountant's report. In this instance, it is not the debtor seeking
22 to shield his own financials. It is a privilege asserted by the Creditor Committee, which has worked
23 diligently to determine the best way to maximize any potential return for creditors in this case. As
24 part of that process, it has reviewed financial records concerning the debtor and its principal, subject
25 to Court's order limiting access to the records reviewed by the Committee (Ct. Dkt. #164) and the
26 confidentiality agreement (required by Debtor under the order), a draft of which is attached by Mr.
27 Hazell to his ex parte motion. The Committee requests that Court apply the accountant-client
28 privilege to prevent the disclosure of its accountant report by Mr. Hazell, without the Committee's

1 waiver of the privilege. To allow its introduction otherwise would undermine the investigative and
2 evaluation functions necessarily performed by creditor committees.

3 The Committee satisfies the requirements to invoke the accountant-client privilege under
4 NRS Chapter 49:

5 A client has a privilege to refuse to disclose, and to prevent any other
6 person from disclosing, confidential communications:

7 1. Between the client or the client's representative and the client's
8 accountant or the representative of the client's accountant.

9 2. Between the client's accountant and the accountant's representative.

10 3. Made for the purpose of facilitating the rendition of professional
11 accounting services to the client, by the client or the client's accountant
12 to an accountant representing another in a matter of common interest

13 NRS 49.185. The statutes further state that "A communication is 'confidential' if it is not intended to
14 be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of
15 professional accounting services to the client or those reasonably necessary for the transmission of
16 the communication." NRS 49.155. The privilege may be asserted by the client, NRS 49.195(1),
17 which includes an "association or other organization or entity, either public or private, who is
18 rendered professional accounting services by an accountant." NRS 49.145.

19 The Committee satisfies all the requirements to invoke the accountant-client privilege to
20 preclude the disclosure of its accountant's report by Mr. Hazell. The Committee is a client eligible to
21 employ an accountant, and the accountant is employed to render professional accountant services in
22 evaluating the debtor's financial records. These facts are evidenced by the Committee's application
23 to employ McGovern & Greene (Ct. Dkt. #146). Therefore, Mr. Greene's report falls within the
24 accountant-client privilege under NRS Chapter 49.

25 Alternatively, the Committee requests that Mr. Greene's report be determined to be privileged
26 under the attorney-client privilege. Courts have recognized that the attorney-client privilege "can
27 extend to accountants when the accountant's role is to clarify communications between an attorney
28 and a client." *Accord Silverman v. Hidden Villa Ranch (In re Suprema Specialties, Inc.)*, Case No.
04-01078 (JMP), 2007 WL 1964852, *4 (Bankr. S.D.N.Y. July 2, 2007), *citing, e.g., United States v.*
Kovel, 296 F.2d 918, 924 (2d Cir. 1961), and *United States v. Akert*, 169 F.3d 136, 139 (2d Cir.

1 1999). Given that Debtor effectively was just a holding company for investments and loans to other
2 businesses, all funded by the unsecured creditors in this case, it was critically necessary for the
3 Committee to retain an accountant to assist it and Committee counsel evaluate Debtor's financial
4 records and proposals for reorganization in this case. Without the accountant's intimate work with
5 counsel, the Committee would not have been able to make education decisions about the matters in
6 this case. Therefore, the Committee requests the Court find that the accountant's report is subject to
7 the attorney-client privilege and/or the work product doctrine.

8 Finally, the Committee does not believe that an individual member of the committee may
9 waive the privilege. Other courts have held that an individual may not waive an institutional conflict
10 of interest. *In re Grand Jury Investigation*, 447 F. Supp.2d 453, 462 (E.D. Pa. 2006). The
11 Committee believes there are similar decisions preventing an individual member of a committee from
12 waiving a committee's privilege, although it immediately identify them in order to respond to this ex
13 parte motion.

14 Dated this 4th day of April, 2010

ARMSTRONG TEASDALE LLP

15 By: /s/ Louis M. Bubala III

16 Louis M. Bubala III

17 Counsel for The Official Committee of
18 Unsecured Creditors
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